

No. 79-638

DEC 10 1979

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEWIS POE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner commenced this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States for injuries allegedly incurred when he was detained and subjected to an involuntary psychiatric examination by military personnel. At the time of the acts alleged, petitioner was on active duty as an Air Force officer.¹ The United States District Court for the District of Hawaii dismissed the complaint, and the court of appeals affirmed (Pet. App. A7). Both courts relied on *Feres v. United States*, 340

¹The complaint alleged that petitioner, "while assigned to duty as a Base Computer Systems Operations Officer, Dover AFB, Delaware," was arrested by several military policemen during his lunch break and transported to a "psychiatric ward at Wright-Patterson USAF Medical Center, Ohio," where he was subjected to examinations without his consent and negligent medical treatment (Pet. App. A3).

U.S. 135 (1950), which held that servicemen cannot recover against the United States, under the Federal Tort Claims Act, for injuries "incident to [their military] service" (*id.* at 146).

The decision of the court of appeals is correct, and petitioner presents no question meriting this Court's review. Petitioner's primary argument here (see Pet. 10, 12, 13, 14) is that the lower courts misinterpreted *Feres* by extending it to any tort involving a serviceman on active duty—a result that petitioner claims is inconsistent with *Brooks v. United States*, 337 U.S. 49 (1949), which permitted a claim by an active duty serviceman who was on furlough at the time of his injury.

This argument simply misreads the court of appeals' opinion. That opinion upheld the dismissal of petitioner's complaint because the alleged injuries were "'incident to service' in the military * * *" (Pet. App. A7, quoting *Feres v. United States*, *supra*, 340 U.S. at 146). Nothing in the court of appeals' decision supports petitioner's claim that the affirmance was based merely on his active duty status. Petitioner, unlike *Brooks*, was not on furlough. Thus, the court of appeals correctly applied settled law to the particular facts of this case.²

Petitioner's further argument that *Feres* is not applicable here because his injury resulted from allegedly illegal military action (see Pet. 7 n.1) is incorrect. *Feres* and its companion cases determined whether the injuries were incident to military service by looking to the status of the injured servicemen, and stated that "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained

²This Court recently re-examined and upheld the *Feres* doctrine, in a somewhat different context, in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

injury * * *." 340 U.S. at 138. One of the cases involved a barracks fire that killed an active duty serviceman; the second and third involved malpractice during surgery on active duty servicemen (340 U.S. at 137).

Most claims of negligence or intentional misconduct by military officials will probably involve some alleged breach of a regulation, but that is immaterial under the rationale of *Feres*. The result in *Feres* and its companion cases would have been no different had there been a regulation prohibiting faulty furnaces or a regulation prohibiting doctors from leaving towels in the stomachs of surgical patients. The question is not whether the allegedly tortious conduct involved a violation of regulations, but whether the injuries alleged to have resulted were "incident to service." The court of appeals correctly held that petitioner's allegations were barred by *Feres*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.³

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

³Petitioner raised essentially the same claims in an earlier suit, which was dismissed by the district court. The dismissal was affirmed by the court of appeals, and this Court denied certiorari. *Poe v. United States*, 577 F. 2d 752 (9th Cir.), cert denied, 439 U.S. 1047 (1978). Petitioner's present suit is, in our view, barred by the doctrine of res judicata, but for reasons that are not entirely clear the United States did not raise that defense in the district court. We did raise the matter in a supplemental brief in the court of appeals, but the court, as noted, affirmed the district court's decision on the merits.